I — Introduction


2. Under Article 4 of Council Directive 79/409/EEC of 2 April 1979 on the conservation of wild birds (the Birds Directive), the Member States are to designate certain areas as special protection areas for birds (‘SPAs’). Originally, the first sentence of Article 4(4) also governed the protection of those areas.

II — Legal context

3. Article 7 of the Habitats Directive amended the rules governing the protection of SPAs:

'Obligations arising under Article 6(2), (3) and (4) of this Directive shall replace any obligations arising under the first sentence of Article 4(4) of Directive 79/409/EEC in respect of areas classified pursuant to Article 4(1) or similarly recognised under Article 4(2) thereof, as from the date of implementation of this Directive or the date of classification or recognition by a Member State under Directive 79/409/EEC, where the latter date is later.'
4. That provision is explained as follows by the seventh recital in the preamble to the Habitats Directive:

'All the areas designated, including those classified now or in the future as special protection areas pursuant to ... Directive 79/409/EEC ..., will have to be incorporated into the coherent European ecological network.'

5. Article 6(3) and (4) of the Habitats Directive, which are applicable here, read as follows:

'3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.'

6. In that regard, the 10th recital in the preamble to the Habitats Directive states:

'an appropriate assessment must be made of any plan or programme likely to have a significant effect on the conservation objectives of a site which has been designated or is designated in future'.

III — Facts, pre-litigation procedure and forms of order sought

7. According to the Commission, the Castro Verde SPA was designated on 23 September
1999. It covers an area of 79 066 hectares. At least 17 species of bird listed in Annex I to the Birds Directive are regularly to be found there, including the lesser kestrel (Falco naumanni), the Montagu’s harrier (Circus pygargus), the great bustard (Otis tarda), the little bustard (Tetrax tetrax), the stone curlew (Burhinus oedicnemus), the roller (Coriacias garrulus), the calandra lark (Melanocorypha calandra) and the short-toed lark (Calandrella brachydactyla).

and Aivados, the other two places being further to the west. Outside the SPA, beginning approximately one-and-a-half kilometres to the southwest of Estação de Ourique, is a zone around a reservoir, defined in the ‘Plano de Ordenamento da Albufeira do Monte da Rocha’ 4/ of 2003. The reservoir’s catchment area is clearly larger, however, and is crossed by all the routes taken into consideration.

8. The section of motorway at issue, between Aljustrel in the north and Castro Verde in the south, runs in a relatively straight line for a distance of approximately nine to 10 kilometres through the western fringe of the Castro Verde SPA. By far the greater part of the SPA, approximately 77 000 hectares, lies to the east of the motorway, with a section approximately 1 700 hectares in area, essentially in the form of a strip of land one to two kilometres wide adjacent to the motorway, to the west of it.

10. An environmental impact assessment had been in preparation since 1998 and was made available on 6 September 1999. According to the assessment, the project significantly affects various species of birds occurring in the SPA.

11. Nevertheless, the project was approved on 19 January 2000. Construction work began soon afterwards and the section has been in use since 21 July 2001.

9. To the west of the motorway, inside the SPA or at its boundary, there are five settlements: Messejana at the northwest corner of the strip of land and Estação de Ourique at its southwest corner with the neighbouring settlement of Aivados approximately one-and-a-half kilometres away to the east, as well as, in the centre of the strip, Conceição and, approximately one-and-a-half kilometres to the east, Alcarias. The motorway approaches to within approximately 700 metres of Messejana, Alcarias


13. The Commission now claims that the Court should:

1. declare that, by implementing a project for a motorway whose route crosses the Castro Verde special protection area (SPA), notwithstanding the negative environmental impact assessment and notwithstanding the existence of alternative solutions for the route concerned, the Portuguese Republic has failed to fulfil its obligations under Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Directive 97/62/EC of 27 October 1997;

2. order the Portuguese Republic to pay the costs.

14. The Portuguese Republic contends that the Court should:

1. dismiss the action;

2. order the Commission to pay the costs.

16. Since the authorisation procedure for the section of motorway in question had already begun before the SPA was designated, it could be doubted whether the competent authorities were entitled to switch, during that procedure, from the protection regime under the Birds Directive to the protection regime under the Habitats Directive, which, while more liberal in substance, is made procedurally more elaborate by the impact assessment. However, a prohibition on switching from one protection regime to the other would render the authorisation procedure unnecessarily cumbersome without in practice advancing the protection of the SPA. That is because the competent authorities would be free to restart the authorisation procedure after the designation of the SPA and to apply Article 6(2) to (4) of the Habitats Directive then at the latest. In such a situation, to insist on discontinuing the procedure or completing it in accordance with the Birds Directive would amount to unnecessary formalism.

IV — Assessment

15. The Commission accuses the Portuguese Republic of infringing Article 6(4) of the Habitats Directive. That provision was applicable only from the date of designation of the Castro Verde SPA, that is, from 23 September 1999. Before the designation of a site which is due to be designated, the first sentence of Article 4(4) applies, but not Article 6(2) to (4) of the Habitats Directive.\(^5\)

5 — Case C-374/98 Commission v France (Basses Corbières) [2000] ECR I-10799, paragraphs 47 and 57; see in that regard my Opinion in Case C-339/04 Commission v Austria (Lauterachrer Ried) [2005] ECR I-2755, point 46 et seq.

6 — Basses Corbières, cited in footnote 5, paragraphs 50 et seq. and 56, and, more cautiously, the judgment in Case C-44/95 Royal Society for the Protection of Birds (Lappel Bank) [1996] ECR I-3805, paragraph 37.
17. Since the Portuguese Government does not plead that the project should be assessed under the first sentence of Article 4(4) of the Birds Directive, Article 6(2) and (4) of the Habitats Directive must therefore be applied.

A — Adverse effect on the Castro Verde SPA

18. Article 6(4) of the Habitats Directive applies only if the conclusions of an impact assessment carried out pursuant to Article 6(3) were negative, that is to say, if the competent authorities were unable to guarantee that the integrity of the protected site in question would not be adversely affected. This last point is disputed by the Portuguese Government.

19. The Portuguese Government rightly submits that, in proceedings for failure to fulfil obligations under the Treaty, it is the Commission which must prove an infringement of Community law. It disputes that the separation of 2% of the area of the SPA concerned here proves that the integrity of the site concerned, within the meaning of the second sentence of Article 6(3) of the Habitats Directive, was adversely affected.

20. However, by designating the areas concerned as part of an SPA, Portugal acknowledged that those areas contain the most suitable environments for the species listed in Annex I to the directive.

21. The construction of a motorway through such areas is in principle liable to affect them adversely in their status as sites most suitable for the protection of birds. The road causes direct land losses, disturbance and pollution of adjoining areas. It also increases the risk that birds will be killed in traffic. Finally, it separates approximately 1 700 hectares of the SPA, that is, approximately 2% of the area, from the remainder of the SPA. The significance of that separation depends on the behaviour and sensitivity of the species concerned.

22. There is therefore no need for any further proof that the integrity of the SPA

7 — See, for example, Case 96/81 Commission v Netherlands [1982] ECR 1751, paragraph 6, Case C-544/01 Commission v United Kingdom [2003] ECR I-33239, paragraph 21, and Case C-194/01 Commission v Austria [2004] ECR I-4579, paragraph 34.

8 — See the judgment in Case C-57/89 Commission v Germany (Leybucht) [1991] ECR I-883, paragraph 20.
Directive concerned is being adversely affected. Rather, it is for Portugal to adduce evidence that the consequences of the project do not adversely affect the integrity of the SPA.

23. The Habitats Directive lays down how that proof must in principle be established, namely, by carrying out an assessment, as required by Article 6(3) of the Habitats Directive, of the project’s implications for the site in the light of the site’s conservation objectives. In that context, all aspects of the plan or project which, either individually or in combination with other plans or projects, could affect those conservation objectives must be identified in the light of the best scientific knowledge in the field. If, on that basis, there can be no reasonable scientific doubt as to the absence of adverse effects on the integrity of the SPA as a result of the project, the project can be authorised without recourse to Article 6(4) of the Habitats Directive.

24. The Commission points out that, of the species of birds in the area concerned, the environmental impact study assigns 17 to Annex I to the Birds Directive and classifies 8 as threatened or rare species in Portugal and 16 as threatened or rare species in Europe. Citing an opinion of the Instituto da Conservação da Natureza, Portugal contends that only eight species listed in Annex I actually use the areas concerned as breeding grounds: the great bustard, the lesser kestrel and the little bustard, which are priority species under Portuguese law, as well as the Montagu’s harrier, the stone curlew, the roller, the short-toed lark and the calandra lark.

25. That contradiction between the study and Portugal’s submissions alone raises considerable doubts about the quality of the environmental impact assessment, since the latter must ascertain which species actually use the areas concerned in order to be able to assess the effects of a project. A reading of the environmental impact study confirms those doubts.

26. The study contains only limited indications of the species which occur. In parti-

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9 — See, in that regard, Leybucht, cited in footnote 8, paragraph 20 et seq., and Case C-355/90 Commission v Spain (Santotxa marshes) [1993] ECR I-4221, paragraph 36, where in each case the Court regarded land losses as significant adverse effects on SPAs.

10 — See the judgment in Case C-209/02 Commission v Austria (Wörtsbach golf course) [2004] ECR I-1211, paragraph 26, and point 40 of the Opinion of Advocate General Leiper in that case, according to which, where adverse effects are scientifically demonstrated, the Member State must prove the effectiveness of mitigation measures.

11 — Case C-127/02 Waddenvereniging and Vogelbeschermingsvereniging (Waddenze) [2004] ECR I-7405, paragraph 53 et seq.

12 — Waddenze, cited in footnote 11, paragraph 59.

13 — Volume II.V, p. 63 et seq. (page 198 et seq. of the annexes to the application).


cicular, it mentions a mating location of the highly disturbance-sensitive great bustard six kilometres away, which suggests that the areas concerned are used for rearing young birds. That species is listed as globally endangered (vulnerable). Portuguese Government names further species listed in Annex 1 as occurring there. No definite observations are documented and no explanations given as to how the various species use the areas and how the project could specifically affect that use.

27. In addition, the environmental impact study mentions breeding colonies of lesser kestrel in the vicinity of the route. There is no dispute that there is a colony at a distance of 80 metres from the route (Quinta da Golipa), and four more at a distance of 800 to 1,000 metres (Montes da Mosquetana, do Álamo, da Ribeira and do Pardieira). In the case of this species, the environmental impact study assumes an average sensitivity to disturbance, but a high sensitivity to fragmentation of its habitat.

28. There are no definite data relating to the significance of the areas concerned for other species, although in these proceedings the

29. Simply because of its deficiencies, that study cannot prove that the Castro Verde SPA was adversely affected by the construction of the motorway as such. However, it is a further indication that such an adverse effect was to be expected, since on the basis of its fragmentary results alone it found that there was a high negative impact (impacto negativo elevado).

30. In the proceedings before the Court, Portugal now contends that the populations of great bustard and lesser kestrel have increased and that the situation of the little bustard is being improved by further, Com-

16 — Cited in footnote 13, p. 64 (page 199).
17 — Cited in footnote 13, p. 68 et seq. (page 203 et seq.).
19 — Cited in footnote 13, p. 64 (page 199).
20 — In particular, the environmental impact study contains no assessment of the individual relationships of cause and effect, for example, land loss, separation effect, noise, air pollution or traffic risk. It therefore fails to comply with the requirements of the Habitats Directive (see Waddington, cited in footnote 11, paragraph 59). However, the Commission does not complain of that infringement.
21 — Volume III/V, p. 78 (page 222 of the annex to the application).
munity-supported measures. In the case of the other species concerned, it has not yet been possible to prove any negative impact.

31. However, under the second sentence of Article 6(3) of the Habitats Directive, it is not sufficient, for authorisation of a project, to prove ex post facto that a project had no negative impact. On the contrary, any reasonable scientific doubt as to the absence of adverse effects on the integrity of the site must be removed before the project is authorised. For that reason alone, the Portuguese Government’s arguments cannot exclude the application of Article 6(4).

32. Moreover, the Portuguese Government’s arguments are also incapable of proving the harmlessness of the project. For many species, it is simply maintained, without providing any further information, that no detrimental effects have been demonstrated.

33. So far as concerns, in particular, the increase in populations of lesser kestrel and great bustard, pleaded by the Portuguese Government, it cannot yet be assumed, even for those species, that the motorway project has not adversely affected the integrity of the Castro Verde SPA. Without knowing the reasons for an increase in a population, an adverse effect on the site as a result of the road construction project cannot be ruled out.

34. In the present case, Portugal itself states that that development is due, in particular, to compensatory measures and to the implementation of the management plan for the Castro Verde SPA, and announces in that connection further measures for the conservation of the little bustard, which are intended to compensate for any adverse effects on that species. However, if the population increases are due to compensatory measures, they cannot prove that the road construction project caused no harm.

35. Within the framework of Article 6 of the Habitats Directive, the adverse effects on a site must be strictly separated from the compensatory measures. Under the regulatory system of the Habitats Directive, adverse effects are to be avoided as far as possible. That is done preferably by eliminating any risk of harm or by taking

22 — Waddensee, cited in footnote 11, paragraph 59.

23 — Thus the Court rejected similar unsubstantiated arguments in the Wörschach golf course case, cited in footnote 10, paragraph 27.

24 — The distinction between paragraphs 3 and 4 of Article 6 of the Habitats Directive was expressly declared in Case C-441/03 Commission v Netherlands (Conformité) [2005] ECR I-3043, paragraphs 26 and 28.
appropriate damage mitigation and prevention measures. By contrast, compensatory measures can be considered only when adverse effects have to be accepted in the absence of any alternative, for overriding reasons of public interest. The preservation of existing natural resources is preferable to compensatory measures simply because the success of such measures can rarely be predicted with certainty.

36. In so far as the Portuguese Government relies on mitigation measures at all, they consist essentially of measures implemented during the construction work and measures to preserve vegetation. However, such measures cannot prevent the adverse effects expected to result from the existence and use of the road.

37. The monitoring measures mentioned partly in this context may well be a necessary part of a programme of damage mitigation and compensation. Taken on their own, however, such measures are likewise incapable of preventing the damage.

38. The Commission is therefore right in assuming that the section of motorway at issue should not have been authorised under the second sentence of Article 6(3) of the Habitats Directive, but at best under Article 6(4).

B — Absence of alternatives

39. Under Article 6(4) of the Habitats Directive, a plan or project may be carried out in spite of a negative assessment of the implications for the site if there are imperative reasons of overriding public interest, including those of a social or economic nature, and in the absence of alternative solutions. In that event, the Member State must take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected.

40. In this case, the parties do not disagree either about whether the construction of the motorway (as a whole) was necessary for imperative reasons or about the measures necessary to safeguard coherence. However, the Commission accuses Portugal of significantly affecting the integrity of the Castro Verde SPA by building the motorway even

25 — See Wörschach golf course, paragraph 26, and point 30 of the Opinion of Advocate General Léger in that case (both cited in footnote 30), as well as my Opinion in Case C-127/02 Waddenvereniging and Vogelbeschermingsvereniging (Waddensea) [2004] ECR I-7405, point 108.
though alternatives to the chosen route were available.

41. Authorisation of a project under the first sentence of Article 6(4) of the Habitats Directive is a derogation from the general principle laid down in the second sentence of Article 6(3) that projects are to be authorised only if they do not adversely affect the integrity of a protected site. As the Commission also points out, it is for the person relying on that derogation to show that the requirements of the derogating provisions have been complied with. Consequently, contrary to the view of the Portuguese Government, the Commission is not required to demonstrate an alternative route, but only to raise reasonable doubts as to whether Portugal has complied with the requirements of Article 6(4).

42. Article 6(4) of the Habitats Directive permits authorisation of projects only in the absence of alternatives. That prerequisite for authorising a project is intended to prevent protected sites from being adversely affected even though the aims of the project could also be achieved in a manner which would affect the protected site less adversely or not at all. The absence of alternative solutions corresponds in that respect to a stage in the test of proportionality, according to which, when there is a choice between several appropriate measures, recourse must be had to the least onerous.

43. The absence of alternatives cannot be ascertained when only a few alternatives have been examined, but only after all the alternatives have been ruled out. The requirements applicable to the exclusion of alternatives increase the more suitable those alternatives are for achieving the aims of the project without giving rise — beyond reasonable doubt — to manifest and disproportionate adverse effects.

44. Among the alternatives short-listed in that way, the choice does not inevitably have to be determined by which alternative least


27 — In Waddenzee, cited in footnote 11, paragraph 59, the Court has already applied the concept of reasonable doubt in connection with the second sentence of Article 6(3) of the Habitats Directive.

28 — In that regard, the judgment in Commission v Netherlands (Conformity), cited in footnote 24, paragraph 27, according to which ‘... the absence of alternative solutions and the existence of imperative reasons of overriding public interest, are intended to enable a Member State to take all compensatory measures ...’ is misleading.

adversely affects the site concerned. Instead, the choice requires a balance to be struck between the adverse effect on the integrity of the SPA and the relevant reasons of overriding public interest.

45. The necessity of striking a balance results in particular from the concept of 'override', but also from the word 'imperative'. Reasons of public interest can imperatively override the protection of a site only when greater importance attaches to them. This too has its equivalent in the test of proportionality, since under that principle the disadvantages caused must not be disproportionate to the aims pursued.

46. The decisive factor is therefore whether imperative reasons of overriding public interest require the implementation of specifically that alternative or whether they can also be satisfied by another alternative with less of an adverse effect on the SPA. That comparison presupposes that the various alternatives have been examined on the basis of comparable scientific criteria, both with regard to their effects on the site concerned and with regard to the relevant reasons of public interest.

47. The Portuguese authorities examined and rejected various alternatives. In some cases these would have passed further to the east, within the SPA, and in some cases further to the west, so that they would have had a less adverse effect on the SPA. The Commission does not object to the choice made from among those alternatives, but to the failure to examine further alternatives in the west of the SPA.

48. The Commission's action is therefore well founded if those alternatives in the west of the SPA should have been examined and if it is conceivable that one of those alternatives was preferable to the route implemented.

49. Portugal's objections to the further alternative routes in the west of the SPA suggested by the Commission are in principle that sites of archaeological finds would be affected and conflicts would arise with settlements along road IC1. However, those arguments are not convincing. It remains completely unclear whether the sites of the finds actually conflict with all possible routes, what significance attaches to them and to what extent their scientific value

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30 — However, that is how the Commission could be understood in its guide Managing Natura 2000 sites, the provisions of Article 6 of the ‘Habitats’ Directive 92/43/EEC, Luxembourg, 2000, p. 47 et seq.
31 — See the case-law cited in footnote 29.
32 — See my Opinions in Lauteracher Ried, cited in footnote 5, point 72, and in Case C-4-04 Commission v United Kingdom (Conformity) [2005] ECR I-9017, point 46.
33 — See my Opinion in Case C-441/03 Commission v Netherlands (Conformity) [2005] ECR I-3043, point 15.
could be safeguarded by timely excavations. There are no obvious conflicts with settlements along the IC1 since there is sufficient room for a motorway route between the western boundary of the SPA and those places.

50. However, all the alternatives in the west of the SPA could be ruled out because of the narrow pass, approximately one-and-a-half kilometres wide, between the reservoir and Estação de Ourique. Such alternatives would either have to be routed in a relatively straight line through that pass or turn off to the east before Estação de Ourique and pass through the SPA in an arc to the north and east of Aivados. Both variants raise obvious problems, yet the Portuguese Government has not demonstrated that they were examined adequately so as to rule out those alternative routes.

52. On the other hand, a route passing to the west of Messejana and Conceição, then turning eastwards and passing in an arc to the north and east of Aivados, had already been examined and rejected because of its proximity to those settlements. It has not so far been demonstrated that similar routes further away from the settlements are ruled out because of higher costs or disadvantages from a traffic engineering point of view. It is also unclear in that regard whether technical mitigation measures were examined, but also whether such a route would actually impact less severely on the SPA than the route which was built.

53. Portugal has therefore failed to demonstrate sufficiently that all the alternatives were examined.

54. The whole process of examining alternatives is also marred by inadequate infor-

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34 — For example, noise protection, construction in an open cut, special treatment of waste water, etc.
mation about the project's adverse effects on the SPA. So far as can be ascertained, neither the actual damage nor measures to mitigate damage caused by the operation of the motorway were assessed. Accordingly, there is also an absence of any classification of the damage within the overall context of Natura 2000, in particular as regards its effects on the conservation status of the species concerned. It is also unclear whether the prospects of success of compensatory measures to safeguard the coherence of Natura 2000 were investigated in advance, which would have been important for the purpose of evaluating the damage. It is therefore also impossible to weigh the adverse effect on the SPA against the reasons of public interest put forward by the Portuguese Government.

55. It is conceivable that a careful investigation of all the alternatives, taking account of the abovementioned aspects, would have had the result that the chosen route would comply with the requirements of the first sentence of Article 6(4) of the Habitats Directive. The size of the SPA concerned and the obvious success of the compensatory measures suggest that the adverse effect on the SPA was rather insignificant. In addition, the disadvantages of a route avoiding the SPA or affecting it less are considerable. However, the Portuguese Government has not adduced the necessary evidence that all those aspects were investigated and weighed.

56. As a consequence of that failure, which initially was only procedural, it should be found on the substance that the competent Portuguese authorities did not examine all the alternatives.

57. Consequently, by implementing a motorway project, the route of which passes through the Castro Verde special protection area, without examining all the alternatives to that route, the Portuguese Republic has failed to comply with its obligations under Article 6(4) of the Habitats Directive.

V — Costs

58. Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been successful, the Portuguese Republic must be ordered to pay the costs.

35 — See my Opinion in Lauteracher Ried, cited in footnote 5, point 74.
36 — See above, point 25 et seq.
37 — For example, crossing aids and fences to prevent collisions.
VI — Conclusion

59. I therefore propose that the Court should decide as follows:

(1) By implementing a motorway project, the route of which passes through the Castro Verde special protection area, without examining all the alternatives to that route, the Portuguese Republic has failed to comply with its obligations under Article 6(4) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, as amended by Directive 97/62/EC of 27 October 1997.

(2) The Portuguese Republic shall bear the costs of the proceedings.